No. 34142

IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,

PLAINTIFF BELOW, RESPONDENT

VS.

UNDERLYING PROCEEDING BELOW

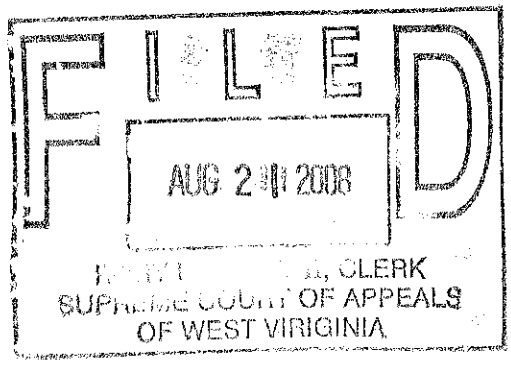
CASE NO. 06-F-210-O

LOGAN COUNTY CIRCUIT COURT

PAUL NEWCOMB,

DEFENDANT BELOW, APPELLANT

APPELLANT'S BRIEF



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I. PROCEEDINGS AND RULINGS BELOW

A. KIND OF PROCEEDING

This is an Appeal pursuant to Rule 37 of the West Virginia Rules of Criminal Procedure. This Brief is filed pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure and briefing scheduled signed July 23, 2008 by the Office of the Clerk for the

Supreme Court of Appeals of the State of West Virginia. This appeal arises from an indictment charging the Defendant/Petitioner, Paul Newcomb, with "Murder in the First Degree" pursuant to W.Va. Code § 61-2-1 and a subsequent jury trial ending August 3, 2007 in which the jury returned a verdict of guilty of Murder in the First Degree without a recommendation of Mercy.

B. NATURE OF RULINGS BELOW

The Petitioner was originally charged with "First Degree Murder and Attempted Murder." At the preliminary hearing, held on or about April 11, 2006, the Magistrate Court found that probable cause existed insofar as the "First Degree Murder" charge and bound the same over for presentment to the Grand Jury. The Magistrate Found that probable cause did not exist insofar as the charge of "Attempted Murder."

The Grand Jury returned a true bill on the "First Degree Murder" charge on or about September 13, 2006. Multiple motion hearings were held in relation to the evidence collected by the State. In Pre-Trial Motions, the Court ruled on the admissibility of certain 404(b) evidence, oral statements, a written statement/confession and the admissibility of physical evidence (a knife). With the exception of ruling that any oral statements or physical responses made by the Defendant relating to the location of the knife were not admissible, the Court ruled almost completely on all motions for the State. Specifically, the Court made the following crucial pre-trial rulings: The Court ruled that certain oral statements/confessions made by the Defendant were admissible finding them not to be a result of police interrogation. The Court ruled that the *inevitable discovery doctrine* applied to the knife alleged to be the murder weapon. The Court ruled

that a prior stabbing incident from Mingo County was admissible under Rule 404(b) of the West Virginia Rules of Evidence.

Voir Dire took approximately one and one-half (1 ½) days. The Court overruled the Petitioner's motion to strike a juror "for cause" relating to what defense counsel maintains was their bias for police officers. The Court overruled the Petitioner's motion to strike a juror "for cause" relating to what defense counsel maintains was a clear indication of bias and prejudice.

After requesting further instructions, the jury returned a verdict of "guilty of Murder in the First Degree without a Recommendation of Mercy."

II. STATEMENT OF FACTS

The Petitioner/Defendant, Paul Newcomb, (hereinafter Paul) was a coal miner living in the Gilbert area of Mingo County, West Virginia, prior to April 1, 2006. This case arises from an ongoing affair between Paul's wife, Johnna Newcomb, and the decedent, Dennis Toler. Johnna Newcomb and Dennis Toler were involved in going to the Methadone Clinic together and in taking drugs together. Johnna Newcomb claimed she met Toler at the Methadone Clinic and there were discussions of drugs. Johnna's body is scarred by needle marks and she testified that Dennis Toler injected her and provided her with drugs during their affair. Paul Newcomb had contact with Dennis Toler on at least three occasions prior to April 1, 2006. Paul testified to at least three incidents of contact prior to the night in issue: On one occasion in the Defendant's home on Christmas, the Defendant came home after a call from his father-in law to find Dennis Toler with Johnna and Toler fled the home. On a second occasion, Paul had gone to return a ring to Toler's ex-wife. While there Dennis Toler shot out the Defendant's

vehicle windows and raised the pellet gun as if to strike the Defendant, Toler then fled.[1] On a third occasion at the Methadone treatment center in Williamson, a physical altercation occurred between Dennis Toler and Paul in the parking lot. The third occasion was brought into evidence under 404(b), over the objection of the Defendant, during the State's case in chief. Paul testified that he had discovered unpaid electric bills and wanted to get the money from his wife before it was spent on drugs. Paul testified that he did not know Toler was in the car until he approached the car. An argument began between the Paul and Toler. Paul testified that Dennis Toler was reaching in his pocket and he used his knife in self defense stabbing of Toler. Malicious Wounding charges were filed in Mingo County and the case was dismissed without prejudice in Magistrate Court. The officers involved in the incident from Mingo County claimed they had intended to present the matter to the Grand Jury.

In relation to the night in issue in Logan County on April 1, 2006, Paul testified in part as follows: Paul received a call from Johnna asking him to go with her to the Methadone Clinic. She was at Toler's house again and Paul believed she would meet him at the mouth of Elk Creek. Toler lived in the home of his parents in Logan County, but in a closed off section of the home. Paul took a knife with him for protection. Paul first went to the bar owned by his friends, the Hopson's. He stayed and talked awhile and then caught a ride with Mr. Hopson to a cross road near the Toler Home. He indicated he was going to go to a co-worker's home first to see about later catching a ride to work. The co-worker was not home. Johnna was not at the designated meeting point so Paul began walking to the Toler home hoping to meet his wife driving away from the Toler

[1] There was no type of ongoing relationship between Paul and Toler's ex-wife and Paul's testimony indicated he had gone over there at her request not knowing Toler would be there.

home and going to their designated meeting point. Upon arriving at the Toler home, Paul encountered his wife and shortly thereafter Toler. An argument ensued and Toler reached for something behind the entry door to his home. Paul attempted to pull Toler out of the home, Toler pulled him inside the home, the knife fell out on the floor, a struggle for the knife occurred, the lights were knocked out, Paul stabbed multiple times in the dark believing his life to be in danger. Toler walked to another area of the home and died in the presence of his parents soon thereafter. There was never a search by the investigating officers to determine whether there was a weapon in the area where Paul claimed that Toler was reaching for a weapon.[2]

Paul was on the railroad tracks when Officer Deputy Harvey arrived. He said "here I am you want me." Paul indicated he was turning himself in. There were Logan County Deputies, State Police Officers and (a) Man City Police Officer(s) on the scene.

III. ASSIGNMENTS OF ERRORS AND MANNER DECIDED BELOW

A. THE CIRCUIT COURT'S FAILURE TO STRIKE TWO JURORS FOR CAUSE WAS AN ABUSE OF DISCRETION.

1. That Circuit Court allowed the State to "rehabilitate a juror" after the juror indicated she was prone to believe police officers over non-police officers. Defendant's motion to strike for cause was denied.
2. That the Circuit Court failed to strike a juror who "illustrated prejudice and/or bias." Defendant's motion to strike for cause was denied.

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[2] The testimony of the Defendant was relatively extensive on the events of the evening. Counsel for the Defendant acknowledges that the statement of facts is paraphrased and based upon the Defendant's account of events on direct examination. Counsel for the Defendant acknowledges that that on cross the State was able to get the Defendant to say that he made an initial aggressive move. Defense counsel maintained at trial and maintains now that the Defendant was referring to oral statements and going toward Toler when he was reaching behind the door. The Circuit Court granted the self-defense instruction request.

B. THAT THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF STATEMENTS MADE BY THE DEFENDANT WHILE IN CUSTODY INCONSISTENT WITH THE ESSENCE OF *MIRANDA V. ARIZONA*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) AND WEST VIRGINIA CASES EXPANDING THEREON.

1. The Circuit Court admitted statements made to an EMS/Police Officer into evidence denying the Defendant's motion to suppress. This ruling was inconsistent with the essence of ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and West Virginia Cases expanding thereon.
2. The Circuit Court admitted statements into evidence that were made to Deputy Harvey after the Defendant was in the custody of Deputy Harvey. This ruling was inconsistent with the essence of ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and West Virginia Cases expanding thereon.

C. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE THE ALLEGED MURDER WEAPON AT TRIAL BECAUSE THE POLICE QUESTIONED THE DEFENDANT ABOUT THE LOCATION OF THE KNIFE WHILE THE DEFENDANT WAS IN CUSTODY BUT WITHOUT READING THE DEFENDANT HIS RIGHTS AS REQUIRED BY *MIRANDA V. ARIZONA* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) AND THE WEST VIRGINIA CASES EXPANDING THEREON.

1. That the Circuit Court allowed the knife to be admitted that was located as a direct result of a ***Miranda Violation*** refusing to apply the ***Fruit of the Poisonous Tree Doctrine.*** This ruling was inconsistent with West Virginia Case law relating to said legal doctrine.
2. That the Circuit Court applied the ***inevitable discovery doctrine*** inconsistent with the laws of this State. This ruling was inconsistent with case law relating to the ***inevitable discovery doctrine.***

D. THE CIRCUIT COURT WAS CLEARLY ERRONEOUS IN ITS FINDINGS RELATING TO THE ADMISSIBILITY OF THE DEFENDANT'S WRITTEN STATEMENT AS THERE WAS A CLEAR VIOLATION OF THE PROMPT PRESENTMENT RULE.

1. The Circuit Court ruled on two occasions, in two separate suppression hearings, that there was "no prompt presentment violation." The facts support the Defendant's position that the primary reason in delay in taking the Defendant to the Magistrate Court was to obtain a confession and the Court's finding were clearly erroneous.

E. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ADMITTING CERTAIN 404(b) EVIDENCE FROM A CASE DISMISSED IN MINGO COUNTY.

1. The Circuit Court ruled that an alleged stabbing from a case dismissed without prejudice in Mingo County was admissible in the case at hand creating a "trial within a trial." This ruling was inconsistent with Rule 403 of the West Virginia Rules of Evidence.

IV. POINTS AND AUTHORITIES

A) Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair. Syllabus Pt. 2, ***State v. Griffin***, 211 W.Va. 508, S.E.2d 645 (2002) citing Syllabus Pt. 5, ***O'Dell v. Miller***, 211 W.Va. 285, 565 S.E.2d 407 (2002)

B) The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the Defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary. ***State v. Miller***, 197 W.Va. 588, 476 S.E.2d 535 (1996)

C) [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. In ***Rhode Island v. Innis***,

446 U.S. 291, 300-02, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297, 307-08 (1980), [Footnotes omitted.] ***State v. Hopkins***; 192 W.Va. 483, 453 S.E.2d 317 (1994)

D) The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case. Syl. Pt. 6 ***of State v. Smith***, 2005 W.Va. (32582) (2005) citing Syl. Pt. 5 of ***State v. Starr***, 158 W.Va. 905, 216 S.E. 2d 242 (1975)

E) Absent a knowing and intelligent waiver of the Fifth Amendment right against self-incrimination, a statement made by a suspect during in-custody interrogation is inadmissible. ***State v. Bradshaw***, 193 W.Va. 519, 527, 457 S.E.2d 456 (1995) citing ***Miranda v. Arizona***, 383 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.E.2d 694, 724 (1966)

F) Police involvement is a prerequisite for finding a confession involuntary. Under the West Virginia Constitution, the voluntariness of a confession for due process purposes turns solely on the constitutional acceptability of the specific police conduct at issue. Sylb. Pt. 3., ***State v. Honaker***, 193 W.Va. 51, 454 S.E.2d 96 (1994)

G) Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt. Syllabus Point 5, ***State ex rel. Grob v. Blair***, 158 W.Va. 647, 214 S.E.2d 330 (1975)

I) "Volunteered admissions by a Defendant are not inadmissible because the procedural safeguards of ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were not followed, unless the Defendant was both in custody and being interrogated at the time the admission was uttered." Syllabus Point 2, **State v. Rowe**, 163 W.Va. 593, 259 S.E.2d 26 (1979). ***State v. Hopkins***; 192 W.Va. 483; 453 S.E.2d 317 (1994).

J) The right to counsel established in ***Miranda*** was one of a 'series of recommended "procedural safeguards" ... [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. ***Davis v. United States***, 114 S.Ct. 2350, 2354, 129 L.Ed.2d 362, 370 (1994) as cited in; ***State v. Bradshaw***; 193 W.Va. 519, 528 457 S.E.2d 456 (2005).

J) To prevail under the inevitable discovery exception to the exclusionary rule, Article III, Section 6 of the West Virginia Constitution requires the State to prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct; (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct; and (3) that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct. ***State v. Flippo***, 212 W.Va. 560, 575 S.E.2d 170 (2002):

K) The delay in taking a Defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the Defendant. Syllabus Pt. 6 ***State. v. Persinger***, 169 W.Va. 121, 286 S.E.2d 261 (1982), as amended, Syllabus Pt. 1 ***State v. Guthrie***, 173 W.Va.290, 315 S.e.2d 397 (1984)Syl. Pt. 8 State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)

IV. ARGUMENT
(Discussion of the Law)

A. THE CIRCUIT COURT'S FAILURE TO STRIKE TO JURORS FOR CAUSE WAS AN ABUSE OF DISCRETION.

1. The Circuit Court allowed the State to "rehabilitate a juror" after the juror indicated she was prone to believe police officers over non-police officers. Defendant's motion to strike for cause was denied. The Court's ruling was inconsistent with ***State v. Griffin***, 211 W.Va. 508, S.E.2d 645 (2002) citing Syllabus Pt. 5, ***O'Dell v. Miller***, 211 W.Va. 285, 565 S.E.2d 407 (2002)

Jury selection in the case at hand began on the morning of July 30, 2007 and did not end until the afternoon of July 31st 2007. A fair reading of the *voir dire* leads to the conclusion that there were a significant number of jurors who believed that police officers should be given a preference over non-police officers insofar as their credibility which contributed to the difficulty in selecting jurors. Unfortunately, in the case at hand the Court was not consistent in striking jurors for cause who illustrated this obvious preconception on police officer testimony.

The Court refused to strike juror Krista McKnight for cause after the following questions and answers:

> MR. ADKINS: Now do you believe that police officers' testimony should be believed more than non-police officer testimony?
>
> PROSPECTIVE JUROR, KRISTA MCKNIGHT: I would say, yes.
>
> MR. ADKINS: I think you indicated that your next door neighbor was John Reed, a home confinement officer?
>
> PROSPECTIVE JUROR, KRISTA MCKNIGHT: Yes, that's correct.
>
> MR. ADKINS: How long has he been your next door neighbor?
>
> PROSPECTIVE JUROR, KRISTA MCKNIGHT: I've known him since probably I was in the first grade, a very long time.

(Page 239 Volume II - Trial Transcript)

.....

The rehabilitation by the Prosecutor was as follows:

> MR. ABRAHAM: If the Court instructs you that you have to treat each witness equally and listen to what they have to say and judge the evidence based upon what they have to say and judge the evidence based on what you see here on the stand, can you do that?
>
> PROSPECTIVE JUROR, KRISTA MCNIGHT: Yes, absolutely.
>
> MR. ABRAHAM: You had indicated you might tend to believe police officers.
>
> PROSPECTIVE JUROR, KRISTA MCKNIGHT: Right.
>
> MR. ABRAHAM: But can you still, if the court instructs you, you're not to give a police officer any more weight than any other witness, can you just wait until you hear what each person would have to say.
>
> PROSPECTIVE JUROR, KRISTA MCKNIGHT: Yes, I can do that.

(Page 240, 241 Volume I - Trial Transcript)

After hearing the arguments of counsel, the Court refused to strike the juror for cause despite defense counsel's request. Importantly, the question asked by defense counsel

was a repeat boiler plate question asked to multiple jurors and multiple jurors were struck for cause due to their preconception that police officer's should be believed more than non police officers. Although, the total exchange with the other jurors may not be exactly the same as juror McKnight, it is clear that multiple jurors were struck due to their propensity to believe police officers.[3] Counsel for the Appellant included the exchange from prospective juror Dana Gullet in the petition for appeal and again suggests that the exchange with juror Gullet is illustrative of the power of rehabilitation and even accidental rehabilitation. (See Petition for Appeal pages 17, 18 and Pages 185 -188 Volume I Trial Transcript) Another juror who initially answered the police bias question affirmatively was juror Connie Taylor. However, she answered defense counsel's clarifying question in the negative and was not objected to by defense counsel. (Pages 254 and 255 Volume I Trial Transcript)

This Court has specifically addressed the issue of rehabilitating jurors and has consistently held:

> Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair. Syllabus Pt. 2, ***State v. Griffin***, 211 W.Va. 508, S.E.2d 645 (2002) citing Syllabus Pt. 5, ***O'Dell v. Miller***, 211 W.Va. 285, 565 S.E.2d 407 (2002)

In the case at hand, as illustrated by the verbatim quotation above, there is a clear statement reflecting the presence of a disqualifying prejudice or bias. Defense counsel

[3] Prospective juror Melinda Browning was struck due to her bias for police officers (Page 111 Volume I Trial Transcript). Prospective juror, Lori Workman, was struck due to her bias for police officers even after a rehabilitation attempt by the prosecutor (Pages 117-119 Volume I Trial Transcript). Prospective juror, Marvel Fraley, after substantial questioning on bias (Pages 123-131 Volume I Trial Transcript). Prospective juror, James Kubow, after acknowledging bias to Prosecutor concerning police (Pages 176-181 Volume I Trial Transcript). Prospective juror, Christa Vance, acknowledged blunt bias for police officers. (Page 200 Volume I Trial Transcript). Prospective juror, David Sanders, was struck due to police officer bias after a rehabilitation attempt (Pages 262-266 Volume I Trial Transcript).

anticipates that the State will ask this Court to distinguish this case and assert that once they explained how the Court process worked to this juror, the juror indicated intent to be fair. We would suggest that this would work to send the Circuit Court backwards in time to the old catch-all, clean-up pre-faced questions of "If the Court instructs you..." In fact, in the case at hand the prosecutor argued in support of rehabilitation in relation to a prospective juror, David Sanders, as follows:

> MR. ABRAHAM: The same back and forth argument, "Your Honor. If you ask these people, they're going to initially show some deference to police officers, but if the Court gives them an instruction, he indicated he could follow that instruction and he'll apply the law as the Court directs."

(Page 265 Volume 1 Trial Transcript)

While it is appropriate for either side to rehabilitate a witness, counsel for the Defendant suggests that it is wholly inappropriate to actually rehabilitate the finders of fact by threat of the power of bench. The extent of juror McKnight's bias and prejudice is reflected in her responses and type of rehabilitation by the prosecutor. This is straight forward rehabilitation by the prosecutor like rehabilitating a police officer who has given an answer inconsistent with the prosecutor's theory. Interestingly, she confirms the bias by saying "right" and then says she can follow the Court's instructions. In ***Griffin***, this Court rejected the notion that the State should be able to rehabilitate jurors and we suggest that this is even a clearer scenario of when rehabilitation should not be permitted. In a capital criminal case what could be more central than a pre-conceived notion that police officers should be believed more than the average citizen/witness?

Confirmation of a bias to believe police officers over non-police officers shouldn't be overcome by simply allowing a juror to in effect say that they will follow

the Judge's instructions. What else are you going to say when you're sitting next to the Circuit Judge? This Court set a precedent in the cases cited above recognizing the power of the magic question. We assert that if the same logic is applied in the case at hand then this Court should reverse and remand.

We respectfully request that this Court not give into any notion that if Courts are too restrictive you can never get a jury struck in serious cases. Actually, the transcript of this case illustrates that while it is slightly time consuming there are actually jurors who don't have pre-conceived notions about law enforcement and do not know any of the witnesses. A little more time in this case would undoubtedly have resulted in the Court getting **all** jurors without pre-conceived notions, bias or prejudice. Getting a fair trial with a jury of your peers is the heart of the criminal justice system. Allowing rehabilitation of jurors by use of the magic question method ultimately jeopardizes the entire concept of a fair trial because it removes the right to a trial by an impartial and objective jury as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14 of the West Virginia Constitution.

2. The Circuit Court failed to strike a juror who illustrated bias and prejudice. The Circuit Court's Ruling was inconsistent with ***State v. Griffin***, 211 W.Va. 508, S.E.2d 645 (2002) citing Syllabus Pt. 5, ***O'Dell v. Miller***, 211 W.Va. 285, 565 S.E.2d 407 (2002) and ***State v. Miller***, 197 W.Va. 588, 476 S.E.2d 535 (1996)

Prospective juror, Tara White, had a significant individual *voir dire* session wherein she illustrated bias and prejudice and was not stricken for cause by the Circuit Court. This juror indicated she was an in-law of individuals recently facing murder charges in Logan County so the prosecutor asked questions to insure that she was not

biased against the State. Her answers ultimately illustrated the opposite was actually true in the sense that **she believed the individuals should have been punished more severely**. Separate from her relatives' cases she felt the case at hand was too sensitive for her and self opined that she may not be able to be fair yet the Circuit Court refused to strike her for cause. Some of the illustrative responses were as follows:

> MR. ABRAHAM: Do you feel like any of them got a raw deal in court because of the police or the prosecutors of the Court system?
>
> PROSPECTIVE JUROR, TARA WHITE: No.
>
> MR. ABRAHAM: That would cause you to have a negative opinion about the system itself.
>
> PROSPECTIVE JUROR, TARA WHITE: No, not raw.

(Page 51 volume I Trial Transcript)

.....

> MR. ABRAHAM: All we're looking for is a juror that would say I'll listen to the evidence that's presented in this case and make a decision based on that. So the question I'm asking is either because those people all got in trouble, you think maybe they deserved what they got or not, do you feel like you could push all that aside and just hear this case? And all we're asking for is an honest opinion. If you don't then that's fine, too.
>
> PROSPECTIVE JUROR, TARA WHITE: Well, I'm going to go back to the honesty. I am very, very sensitive and I don't know if I could, you know, be fairly judgmental.
>
> MR. ABRAHAM: When you say "sensitive" do you mean to other criminal acts or—
>
> PROSPECTIVE JUROR, TARA WHITE: I don't know how to explain it to you. Let me see if I can put it in the right words. Something as major as this, I don't know if I could be as fair as I need to be, you know swaying my judgment.
>
> MR. ABRAHAM: Let me ask you this. Are you saying because of the kind of case this is?
>
> PROSPECTIVE JUROR, TARA WHITE: Yes.

MR. ABRAHAM: Let me ask you this. Are you saying because of the kind of case this is?

PROSPECTIVE JUROR, TARA WHITE: Yes.

MR. ABRAHAM: So you're saying this is a real serious case, you think.

PROSPECTIVE JUROR, TARA WHITE: Yes

MR. ABRAHAM: Now are you saying just because this is a serious case, that would cause you problems, or are you saying because of these other things that have happened to your in-laws?

PROSPECTIVE JUROR, TARA WHITE: Nothing—putting my in-laws aside, it has nothing to do with them. Just specifically because of the type of case that it is.

MR. ABRAHAM: You have concerns about yourself in this case because of the type of case it is.

PROSPECTIVE JUROR, TARA WHITE: Right, yes.

MR. ABRAHAM: What is it that, what are your concerns if I could ask that?

PROSPECTIVE JUROR TARA WHITE: Just specifically because it is a murder, and I don't know if I could actually handle the whole situation with it. I don't know.

MR. ABRAHAM: Do you feel like you'd be inclined one way or another?

PROSPECTIVE JUROR, TARA WHITE: I'm sure that I could come to a decision. There's no doubt about that. But I know it would be a sensitive issue. Do I make sense?

MR. ABRAHAM: Just personally sensitive to you.

PROSPECTIVE JUROR, TARA WHITE: Yes. Sometimes words don't come out right. I'm sorry.

MR. ABRHAM: I understand, thank you. He may have some questions.

MR. ADKINS: Ma'am, the prosecutor asked you several questions about your in-laws' case and he even ask you whether you thought they got a raw deal. Do you feel the opposite, you feel like they should have gotten greater punishment?

PROSPECTIVE JUROR TARA WHITE: Yes, I do.

(Pages 54-57, Volume I Trial Transcript)

The answers of the juror only can lead to the conclusions that she believes her in-laws should have been punished more severely and that she thinks the case is too sensitive for her. Importantly she says and never actually changes her opinion that she does not know if she can be fair or as she says "...fair as I need to be, you know swaying my judgment." While she ultimately stated that she could reach a decision, she never indicated she could be fair or that the case was not too sensitive for her. The only thing certain was that she believed her in-laws who recently faced murder charges should have been punished more severely and she was not sure she could be a fair as she needed to be. This Court held in syllabus point 4 of ***State v. Miller***, 197 W.Va. 588, 476 S.E.2d 535 (1996) that:

> The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the Defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

In the case at hand we only know that she said the case was too "sensitive" and she was not sure she could be "fairly swayed." Subsequent to asserting her inability to be fair **she actually did not even proclaim she could set it aside and become impartial, she simply said she could reach a conclusion.** When you place those odd statements in combination with her feelings about her in-laws not getting punished enough it is clear that she should have been struck for cause based upon the *totality of the circumstances* known to the Trial Judge. Defense counsel anticipates that the State may maintain that to strike this juror for cause would allow any juror feeling a matter is sensitive to be

stricken for cause and/or that this juror indicated she could arrive at a decision. Defense counsel suggests that the juror should have been taken at her word; she believed it was too sensitive, she was not sure she could be fair. A juror simply saying she can arrive at decision does not justify the conclusion that a juror can be fair and impartial especially after they have indicated otherwise.

Like juror McKnight, juror White should have been struck for cause and this case should be reversed and remanded due to this Constitutional Violation accordingly.

B. THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF STATEMENTS MADE BY THE DEFENDANT WHILE IN CUSTODY INCONSISTENT WITH THE ESSENCE OF *MIRANDA V. ARIZONA*, 384 U.S. 436, 86 S. CT. 1602, 16 L. ED. 2D 694 (1966) AND WEST VIRGINIA CASES EXPANDING THEREON.

1. Statements made in response to questions asked by an EMT who was also a Man City Police Officer were taken in violation of *Miranda v. Arizona,* and the West Virginia cases expanding upon the same.

At issue here are two statements allegedly made by the Defendant in response to questioning by an ambulance employee who is a part-time police officer at the same police department as one of the other officers who was on the scene. After being taken into custody by the Sheriff's Department, Deputy Weston Harvey testified that he took the Defendant to be examined by Ray Bryant, an EMT and Man City Police Officer to check for signs of injury. While examining the Defendant, Officer Bryant questioned the Defendant about his involvement in the crime. Importantly, Officer Bryant was never required to testify concerning this sequence of events; but testimony was offered both at the suppression hearing and at trial by Deputy Harvey. The relevant testimony on direct examination is as follows:

Q. You said that there were two statements by the Defendant. One is "Yeah, I stabbed him." Then the other is "He deserved it" or something like that.

A. He said, did you stab that guy up there and he said "Yes." He said, well, that guy up there is dead.

Q. That is what I'm asking. He who, Ray Bryant, "he" being Ray Bryant.

A. Said, "Did you stab that guy?"

Q. And he said, "Yeah."

A. Paul Newcomb said, "Yes."

Q. Did Ray Bryant Say anything else?

A. No sir. Well yes, he said, "That guy is dead up there."

Q. He said, "That guy is dead."

A. Right

Q. Ray Bryant Said that?

A. Yes, sir.

Q. Then the Defendant said?

A. That's what the mother-fucker gets.

Q. So that wasn't a question. That was the Defendant making a statement.

A. Right

MR. ABRAHAM: I just wanted to draw that distinction.

(404(b) and Suppression Hearing, 3/8/07, pages 83-84)

Obviously, the first statement was confessional in nature. The second statement is extremely prejudicial and also confessional in nature. The Defendant was never ***Mirandized*** until later being formally placed under arrest and questioned by Deputy

Sutherland, the lead investigator in the case, sometime well after this transaction occurred. (404(b) and Suppression Hearing, 3/8/07, pages 93-95)

The State argued at the first suppression hearing that this line of questioning was not subject to Miranda because Ray Bryant was acting in his capacity as an EMS worker and not as a police officer. (404(b) and Suppression Hearing, March 7, 2007 page 120). The State also argued that this was not actual questioning but, rather, merely informing the Defendant that the victim had died. (404(b) and Suppression Hearing, March 8, 2007, pages 120-21)

The Court ruled in favor of the State and stated as follows:

> There is no evidence presented to the Court by which the Court would take judicial notice of Mr. Bryant's time that he may or may not have served as a police officer. The testimony before the Court is that Mr. Bryant was one of two EMS attendants that had been called to the scene when the emergency call came in and that after the Defendant was handcuffed by Deputy Harvey; he was taken to Mr. Bryant for an initial evaluation of whether he might need any medical treatment.
>
> At that time Mr. Bryant was evaluating him as an EMS attendant, Emergency Medical Service attendant, asked him if he had been the individual that had stabbed the other person involved and Mr. Newcomb voluntarily responded that he had. There was no evidence that Ray Bryant was engaged by the police to assist in their investigation or was prompted in trying to get information from the Defendant or was acting as an Agent of the police.
>
> The testimony further indicates that upon hearing that, that Ray Bryant informed the Defendant that the person who had been stabbed passed away and that was a statement not prompting a response. The response made by the Defendant was unsolicited and not as a result of any interrogation and given when Mr. Bryant wasn't acting as an Agent for the police so Mr. Newcomb's response would likewise be admissible.

(404(b) Suppression Hearing March 8, 2007 at Page 124)

Interestingly, the Circuit Court appeared to have overlooked that the State referred to him as Officer Bryant in oral argument prior to the Court's ruling, stating:

> Again, I don't think EMS personnel, even though he is a police officer in another life or in another job, he was not acting in a law enforcement capacity there and was not prompted by anyone in law enforcement to act on their behalf to seek an interrogation or seek a confession from the Defendant.

Further, the Circuit Court gave no weight to the fact that the State could not establish whether Ray Bryant was a police officer or not at the time in issue. Deputy Harvey refers to him as a part time police officer on cross examination. (404(b) Suppression Hearing of March 8, 2007 at Page 82) The Circuit Court also allowed the State to present the questions of Officer Bryant at the suppression hearing through the hearsay of Deputy Harvey. (404(b) Suppression Hearing of March 8, 2007 at Pages 82-83)

The nature of the question itself, and the circumstances surrounding the questioning, compels the conclusion that the Court was mistaken in its ruling. First, as to the issue of whether Ray Bryant was acting in his capacity as a police officer or as an EMS employee, the issue is not as simple as the lower court's ruling indicates. As a trained police officer, it would be impossible during a murder investigation for Mr. Bryant to separate his two identities so easily. As a trained police officer, he would know the limitations of ***Miranda*** and that if he asked the Defendant if he did it, that it could at least be argued, as it was here, that ***Miranda*** doesn't apply because he was only an EMS worker. It would also be extremely likely that he would want to help his fellow officers any way he could including Officer Walls who like Officer Bryant is from Man City Police Department. Officer Walls was present despite being out of his jurisdiction.

The issue should not be whether Mr. Bryant was acting as an agent of the police because the police engaged him to do it. The real question should be whether he was in fact acting as an agent for the police regardless of the intent of the on-duty officers on the scene. The factual reality of the situation is that Ray Bryant stepped out of his role as an EMS employee and into his role as a police officer by his own actions. Why would he engage in such a line of questioning at all if he was merely an EMT and not, at least, trying to assist the police?

The Trial Court also held that the second statement made by the Defendant was not in response to any question, therefore, admissible because it was not the result of interrogation. Under the circumstances, the Court below applied the wrong standard. This Court discussed this issue and followed the standard laid out by the United States Supreme Court:

> In ***Rhode Island v. Innis***, 446 U.S. 291, 300-02, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297, 307-08 (1980), the Supreme Court discussed what constitutes questioning:
>
> > [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have*

known were reasonably likely to elicit an incriminating response. [Footnotes omitted.] cited in ***State v. Hopkins***; 192 W.Va. 483, 487, 453 S.E.2d 317 (1994)

Clearly the line of questioning engaged in by Officer Bryant was designed to elicit a response. If Officer Bryant would have made the statement "that man is dead," without anything further, the result may have been different. However, making that same statement, immediately after asking the Defendant whether he was the killer, demonstrates that Officer Bryant intended to elicit some kind of response from the Defendant. The Q & A flowed like that from a police investigation not an EMT. Apparently he never asked basic questions like "are you injured sir" or "where are you injured".[4] The questions and situation as a whole simply did not match the Court's conclusion. The standard is whether Officer Bryant *should have known that his statement was likely to elicit a response.* As a trained police officer he certainly should have anticipated that his statement would bring *some* response from the Defendant. Looking at the statement in its broader context, it was clear that he was trying to get the Defendant to react.

As mentioned above, Officer Bryant was never called to testify at trial. During the suppression hearing, the Prosecutor indicated that Officer Bryant would be called as a witness at trial. That was part of the State's representation to the Court prior to the Court making its rulings.[5] Instead, Deputy Harvey was called to give his recollection of the events. Not only is this hearsay, and should have been excluded for that reason, but it prematurely shifted the burden of proof to the Defendant. It's not the Defendant's

[4] If Officer Bryant did ask physical care questions, it was never before the Court, because the State was allowed to jump that hurdle without even putting him on the stand.

[5] The prosecutor stated that he expected Ray Bryant to be there to testify at trial and then focused on whether it was a custodial interrogation. (Page 120 of Suppression Hearing, March 8, 2007.)

obligation to present the State's witnesses or to assist the State in proving its case. The initial burden with the introduction of confessions clearly rests with the State. This Court has consistently held that:

> The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case. Syl. Pt. 6 ***of State v. Smith***, 2005 W.Va. (32582) (2005) citing Syl. Pt. 5 of ***State v. Starr***, 158 W.Va. 905, 216 S.E. 2d 242 (1975)

Due to the pre-mature burden shift, the Defendant's attorneys were in the position of having to disprove the State's assertions about the statement and Ray Bryant without the State having to ever putting Officer Bryant on the stand. The State acknowledged in their argument he may be a police officer, but maintained he was acting as an EMS worker without even putting him on the stand to prove or justify such an important assertion. In fact it is clear that whether Officer Bryant was functioning as police officer or an EMT was a determinative issue on whether the statement should get in or not given that the Circuit Court ruled that other ***Un-Mirandized*** statements taken after the defendant was under de-facto arrest relating to the location of the knife did not get into evidence. A burden shift clearly occurred prematurely, the Circuit Court should not have found that the State met its initial burden without the individual who performed the interrogation testifying at the suppression hearing.

The two statements allegedly made by the Defendant in response to Ray Bryant's questioning should have been excluded from evidence in the State's case-in-chief. Based upon a the evidence and *Totality of Circumstances* before the Court could not have properly concluded that Officer Bryant did not exceeded his role as an EMS worker and

slip into his role as criminal investigator. In fact the question "Did you kill him?" has nothing to do with providing physical care to anyone and everything to do with the criminal investigation that was clearly underway. When Paul turned himself in saying "here I am" and was cuffed and placed in custody, Paul should have been ***Mirandized*** before any questioning took place.

The case at hand does not present a situation like ***State v. Honaker,*** 193 W.Va. 51, 454 S.E.2d 96 (1994) where incriminating utterances were made to hospital personnel without the presence of law enforcement in a non-custodial situation.[6] In ***Honaker*** the Supreme Court of Appeals of West Virginia held:

> Police involvement is a prerequisite for finding a confession involuntary. Under the West Virginia Constitution, the voluntariness of a confession for due process purposes turns solely on the constitutional acceptability of the specific police conduct at issue. ***Id***, Sylb. Pt. 3.,

In the Case at hand the Court did correctly recognize that Paul was in custody from the time that Deputy Harvey cuffed him on the tracks. The Appellant fully recognizes that police involvement is a prerequisite for finding a confession involuntary. The problem in the case at hand is that the State was permitted by the Court to assert no police involvement without Officer Bryant ever testifying as to what capacity he was acting in at the time of his interrogation, as Officer Bryant or as EMS Bryant. It should not be overlooked that Officer Walls from Man City Police the same Police Agency that Officer Bryant works for was there *as backup*. (Page 12 Volume III trial transcript) This

[6] ***Honaker*** was the transitional case that clarified the necessity of police involvement before application of Miranda protections. The brief for the State was drafted by two interns for the Wood County prosecutor's office, one of them was named Dwayne Adkins.

investigation covered most our local law enforcement with Logan County Deputies, State Police and with **two** Man City Police Officers.

Additionally, this Court has recognized the reality of off duty police capacity in the decision of ***State v. Phillips***, 205 W.Va. 673, 520 S.E.2d 670 (1999). The Supreme Court of Appeals of West Virginia held in Syllabous Point 5 as follows:

> A municipal police officer on off-duty status is not relieved of his obligation as an officer to preserve the public peace and to protect the public in general pursuant to West Virginia Code § 8-14-3 (1998) Indeed, such police officers are considered to be under a duty to act in their lawful and official capacity twenty-four hours a day.

The decision was recognition that a person can commit assault of a police officer against an off-duty police officer, but also recognition of the reality that a police officer is in fact a police officer 24/7 and that hat goes back on in the blink of an eye.

Because the Court ruled that Ray Bryant was not acting in his capacity as police officer without the State ever having to put him on to testify as to why he asked the questions he asked, this case should be reversed for full evidentiary hearings on the issue prior to a new trial.

2. The Statements referenced as "Rambling On" by Deputy Harvey were taken in violation of *Miranda.*

Deputy Harvey testified about statements that were characterized by him as Ramblings and were ruled admissible by the Court. Deputy Harvey was unable to place a time frame on when the statements were taken stating in part:

Q. Is that the only statements that were made verbally in your presence, what you testified too or were there some others?

A. He was rambling on, the statement; I don't know if it was when I just took him to the car, when I walking him to the car to get him checked out. Be he was going on "how would you feel if your wife spent all your money on drugs and this SOB screwing your wife and giving her drugs."

(404(b) Suppression Hearing of March 8, 2007 at Page 75.)

So, the Circuit Court could not have been clear on when these statements were made. They could have been made after Officer Bryant's interrogation or before. Deputy Harvey was also unclear on whether he had asked Paul where the knife was indicating that Paul may have told him he threw the knife as he was walking across the road. (Page 48, Transcript of Suppression Hearing of March 8, 2007.) So that it may have been that Harvey questioned Paul, Officer Bryant questioned Paul and then Paul made the statements referenced as "Ramblings."

Miranda Rights are referenced throughout this petition. That is because ***Miranda*** was violated multiple times by the Police in this case, but the Circuit Court only recognized it in relation to the questions asked insofar as the location of the knife. The Petitioner maintains that under straight forward ***Miranda*** analyses the "Ramblings" of Paul as described above also should not have been deemed admissible. The Supreme Court of Appeals for West Virginia has continuously recognized that Miranda still stands for the straight forward proposition that:

> Absent a knowing and intelligent waiver of the Fifth Amendment right against self-incrimination, a statement made by a suspect during in-custody interrogation is inadmissible. ***State v. Bradshaw***, 193 W.Va. 519, 527, 457 S.E.2d 456 (1995) citing ***Miranda v. Arizona***, 383 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.E.2d 694, 724 (1966)

In the case at hand it is patently obvious that Paul was in custody, a suspect and that he had been questioned by before any "Ramblings" occurred and they should have been suppressed accordingly.

It further should not be overlooked when analyzing all of these initial statements made prior to the ***Mirandized*** written statement that the Court was inconsistent in his rulings relating to statements made prior to the Defendant being ***Mirandized***. The Circuit Court correctly ruled that statements relating to where the knife was located were not admissible. These statements and/or physical motions relating to the knife were custodial statements just like the statements the Court admitted. The Court failed to take into account the all of the evidence and circumstances clearly before it. It is undeniable that Paul was in custody and he was questioned while without being Mirandized. It is unclear whether questioning about the knife with Harvey occurred before questioning by an EMS/Police-Officer. It is clear that the police take him still ***Un-Mirandized*** to tell them where the knife is located, then after he is no longer "mad" Deputy Sutherland gets him to initial every box on a standard Miranda form and after smoking a cigarette he tells part of his story as interpreted by Deputy Sutherland in the written statement. It is important to note that the Circuit Judge Rules any statements made to Harvey or the subsequent officers about the location of the knife is inadmissible. The Findings by the Circuit Court were clearly erroneous and the admission of the statements was an abuse of discretion.

The State may point towards other evidence in the case and assert that even if the Defendant is right the admissibility of these statements would be harmless error. Defense

Counsel believes this to be inconsistent with West Virginia Law. The Supreme Court of Appeals of West Virginia has held:

> Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt. Syllabus Point 5, ***State ex rel. Grob v. Blair***, 158 W.Va. 647, 214 S.E.2d 330 (1975)

Defense counsel asserts that given the magnitude of the statements and the potential inflammatory nature of the statements in issue admission of the statements was certainly not harmless error.

C. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE THE ALLEGED MURDER WEAPON AT TRIAL BECAUSE THE POLICE QUESTIONED THE DEFENDANT ABOUT THE LOCATION OF THE KNIFE WHILE THE DEFENDANT WAS IN CUSTODY BUT WITHOUT READING THE DEFENDANT HIS RIGHTS AS REQUIRED BY *MIRANDA V. ARIZONA* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) AND THE WEST VIRGINIA CASES EXPANDING THEREON.

1. The Circuit Court allowed the knife to be admitted that was located as a direct result of a ***Miranda Violation*** refusing to apply the ***Fruit of the Poisonous Tree Doctrine.***

The next major issue is whether or not the State, in failing to read the Defendant his ***Miranda*** warnings prior to questioning him about the location of alleged murder weapon, engaged in misconduct sufficient to require the Court to exclude the knife from evidence at trial.

Deputy Wesley Harvey was the first officer on the scene. Deputy Harvey testified at the suppression hearing that, after initially securing the crime scene to assist the ambulance personnel, he located the Defendant some distance from the scene and the

Defendant said, in effect, "here I am, come get me." The Deputy further testified that the Defendant initially refused to get down on the ground and force was used to get him down on the ground. He was then placed in hand-cuffs and placed in Deputy Harvey's police cruiser. (404(b) Suppression Hearing, March 8, 2007 at pages 69-70) While Deputy Harvey claims the Defendant was not under arrest (404(b) Suppression Hearing on March 8, 2007 at Page 71) he later admits under cross-examination that the Defendant was not free to leave. (404(b) Suppression Hearing on March 8, 2007 at Page 78)

It is undisputed that the officers involved never ***Mirandized*** the Defendant before questioning the Defendant about the whereabouts of the alleged murder weapon. The prosecutor conceded this in his argument (Suppression hearing, on March 27, 2007 at page 73). Clearly Miranda warnings were required as the Defendant, while not formally arrested, was certainly in custody and in de-facto arrest.

> "Volunteered admissions by a Defendant are not inadmissible because the procedural safeguards of ***Miranda v. Arizona***, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were not followed, unless the Defendant was both in custody and being interrogated at the time the admission was uttered." Syllabus Point 2, **State v. Rowe**, 163 W.Va. 593, 259 S.E.2d 26 (1979). ***State v. Hopkins***; 192 W.Va. 483; 453 S.E.2d 317 (1994).

Consequently, the Trial Court correctly held that the statements of the Defendant relating to the knife were excluded. However, despite the blatant ***Miranda*** violation, the Court ruled the knife found through the questioning process as admissible and allowed State to introduce the knife in its case-in-chief. The Circuit Court's ruling was inconsistent and clearly the evidence discovered as a result of the ***Miranda Violation*** should have been suppressed.

As pointed out in the Petition for Appeal the United States Supreme Court has chosen not to extend the fruit of the poisonous tree doctrine to scenarios such as those presented in the case at hand[7]. However, the Defendant believes that this Court has *barred the use of any evidence obtained as a result of violation of Miranda warnings as fruit of the poisonous tree* and should so clarify the same in the case at hand. Counsel for the Appellant believes that the final holding and reasoning in ***State v. Williams***, 162 W.Va. 309, 249 S.E. 2d 758 (1978) is applicable to the circumstances at hand. In said case, the Supreme Court of Appeals of West Virginia held as follows:

> Finally, we consider the admissibility of the defendant's boots. The evidence of record on this issue is not well developed. It is undisputed that the defendant was questioned in his residence before Miranda warnings were given. We hold that the defendant was by no means free to go his merry way and was so restricted in his freedom at the time he was questioned in his home that the strictures of Miranda V. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), designed to secure the right to counsel and to remain silent, are applicable, and the boots, having been located as a result of the defendant's responses, are inadmissible.

Id, at 318, 319

Counsel for the Appellant recognizes that the ***Williams*** decision cited above has primarily been used as authority on the issues of whether consents are voluntarily made and whether subsequent confession should be admissible and the footnotes to the case focus on the same, but the final holding appears to be squarely on point here. It should not be overlooked that the factual scenario of questioning prior to Miranda to gain physical evidence is strikingly similar to the scenario at hand. Further, *Fruit of the Poisonous*

[7] In 2004 the United State Supreme Court, in United States v. Patane, 542 U.S. 630 (2004) refused to extend the fruit of the poisonous tree doctrine articulated in Wong Sun to voluntary statements made in violation of Miranda. However, this Court is not bound by this holding as it is free to extend constitutional protection beyond that delineated by the federal courts.

Tree doctrine and its application to Miranda Violations appear to be implicit in other cases decided by this Court. [8]

Id at 94.

In the case at hand there can be no doubt that there was a Miranda Violation as the Court ruled accordingly and there can also be no doubt that the violation lead to the discovery of the knife. The purpose of the Miranda rule is to prevent Defendants from incriminating themselves without being warned of their potential rights and the possible consequences of talking to law enforcement to comply with the constitutional right against self-incrimination.

> The right to counsel established in ***Miranda*** was one of a 'series of recommended "procedural safeguards" ... [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. ***Davis v. United States***, 114 S.Ct. 2350, 2354, 129 L.Ed.2d 362, 370 (1994) as cited in; ***State v. Bradshaw***; 193 W.Va. 519, 528 457 S.E.2d 456 (2005).

Failure to apply ***Miranda*** in this way would leave officers free, as happened in this case, to pry incriminating information that could lead to discovery of physical or other evidence from a Defendant without any true concern for the Defendant's constitutional protections. One of the main purposes of the constitutional protections against self-incrimination is to prevent this type of un-warned encounter from happening. Miranda prevents Gestapo tactics removing the teeth from Miranda will send this State

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[8] . Interestingly, in the juvenile case ***George Anthony W. v. Sephfon W.***: 200 W.Va. 86, 488 S.E.2d 361 (1996) the Supreme Court of Appeals of West Virginia directed the Circuit Court in that case to look at whether illegal acquired confessions were what lead to the evidence in issue with the clear implication being that if so it would not be admissible. See also: ***State v. Mullins***, 177 W.Va. 531, 355 S.E. 2d 24 (1987); ***State v. Stanley***, 168 W.Va. 294, 284 S.E.2d 367 (1981); and ***State v. Canby***, 162 W.Va. 666, 252 S.E.2d 164 (1979). While these cases appear to infer the fruit of the poisonous tree doctrine would apply by their reasoning they do not appear to squarely say physical evidence acquired from a statement acquired in violation of Miranda is in-admissible.

back down an archaic path where police can violate the law to get what they are seeking with no real ramification for their actions. Clearly the failure to Mirandize a Defendant before questioning him or her is misconduct. Allowing the State to use evidence derived from the unlawful questioning of a Defendant removes any real teeth from ***Miranda***. A remedy should exist for constitutional violations and merely suppressing the statement of the Defendant, while permitting the introduction of the evidence derived from such questioning leaves the Defendant with no real remedy for violations and undercuts the very purpose of the ***Miranda*** rule because the damage is done not by the statement but by the introduction of the evidence derived from it. An analogy can be drawn with the West Virginia Supreme Court's reasoning in ***State v. Deweese,*** 213 W.Va. 349, 582 S.E.2d 786 (2003) where the Court ruled in relation to the fruit of the poisonous tree doctrine and prompt presentment as follows:

> If this Court did not extend the fruits of the poisonous tree doctrine to a violation of the prompt presentment rule, then prosecutors could get around the legal consequences of obtaining a statement in violation of the rule by introducing testimony only of matters learned from the contents of the statement instead of the actual statement itself. Such conduct is impermissible.

Id at 346

If this Court agrees with the Circuit Court Ruling then ***Miranda*** becomes meaningless in the context of getting Defendant's to reveal where evidence is located. For example the police could simply ask a person under de-facto arrest "Where is (evidence in issue)" and there answer would not be admissible, but the piece of evidence gathered as result would be. I suggest that this would result in rampant ***Miranda*** Violations because the police would use this tactic to locate evidence with no concern for the State Constitution. Importantly, a fair reading of the testimony illustrates that is

exactly what happened here. There was simply no reason for the officers not to ***Mirandize*** a Defendant who says "here I am" and surrenders. Officer Harvey and the Prosecutor wanted to avoid any ramifications for violating the defendant's Constitutional Rights through vague accounts of how things transpired the totality of the testimony illustrated to the Circuit Judge a clear Miranda Violation, unfortunately the Circuit Court failed to apply any true consequences for such a flagrant disregard for the State Constitution.

Because the Defendant was not ***Mirandized*** before being questioned about the location of the alleged Murder weapon, the Trial Court should have excluded the knife as ***fruit of the poisonous tree***. The Defendant asserts that this error alone clearly constitutes reversible error.

2. The *inevitable discovery rule* was not properly applied by the Court in the case when the Court ruled that the knife was admissible under said doctrine.

The State will undoubtedly argue, as it did at the suppression hearing, that the ***inevitable discovery rule*** applies and that, notwithstanding the police misconduct in failing to ***Mirandize*** the Defendant before questioning him about the locus of the alleged murder weapon, the police would have found it anyway. This is clearly not the law. This rule was state by the Court in Syl. Pt. 4, ***State v. Flippo***, 212 W.Va. 560, 575 S.E.2d 170 (2002):

> To prevail under the inevitable discovery exception to the exclusionary rule, Article III, Section 6 of the West Virginia Constitution requires the State to prove by a preponderance of the evidence: (1) that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of

police misconduct; **(2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct**; and (3) **that the police were actively pursuing a lawful alternative line of investigation to seize the evidence prior to the time of the misconduct.** (Emphasis supplied).

The State cannot prevail under this theory under the second and third parts of this test. First, the *only* lead that law enforcement had was the Defendant. There was no testimony at either suppression hearing that the State had any leads whatsoever concerning the location of the knife before officers questioned the Defendant. The prosecutor argued that the lead was the officer's knowledge of the general location of the *Defendant* at the time he was taken into custody. This pre-supposes that the Defendant would have disposed of the knife in the general vicinity of his location and therefore is not a lead. The knife could have been anywhere.

Secondly, even if the State could prevail under the second part of the test, they did not meet the third prong of the test. The police were not pursuing any search for the weapon until after its general location was made known by the Defendant. Two officers were responsible for finding the weapon: Trooper Sparks and Deputy Robinette. Trooper Sparks testified that when he arrived on scene, one of the deputies advised him about the general location of the knife, indicating that the misconduct had already occurred:

Q. And what was the action you took when you first got there?

A. When I arrived on scene, I was advised that a stabbing occurred. I was advised that the murder weapon had been thrown over the riverbank. At that time I proceeded over the riverbank in an attempt to locate the weapon.

Q. Let me ask you, who advised you that it had been thrown over the riverbank?

A. Another police officer, I don't recall which officer.

Q. Can you recall which agency the officer would have been with, the Sheriff's Department or?

A. I believe it was the Sheriff's Department.

(Suppression Hearing Transcript, March 27, 2007 at Page 9).

Trooper Sparks was unsuccessful in his first attempt to locate the weapon. It was found later with the direct assistance of the Defendant:

Q. You say at that time, between 4:30 and 5:00, you did not find the knife, is that right?

A. No, sir, I did not.

Q. But at that time you had already been advised the knife was down in that area?

A. Yes sir.

Q. What's your recollection of going back into that area? How and why did you go back there?

A. I came over the riverbank from the first search, and I was advised that the Defendant would show us where the weapon was. At that time, myself and, I believe, Deputy Robinette also took the Defendant over the riverbank. At that time the weapon was pointed out.

(Suppression Hearing Transcript, March 27, 2007 at Page 13).

The witness further stated that neither he, nor any other officer in his presence, ***Mirandized*** the Defendant. (Suppression Hearing Transcript, March 27, 2007 at page 14). Interestingly, it was not clear who was questioning Paul to find out that he would go and show them the knife. Obviously, a question or questions had to be asked before he was removed from the cruiser and took over the river bank.

Deputy Robinette's testimony largely mirrors that of Trooper Sparks except he recalled that Deputy Harvey told him the general location of the knife before the first

search. (Suppression Hearing Transcript, March 27, 2007, pages 23-24). There was no testimony from any officer, including the lead investigator, Deputy Sutherland, and the first officer on the scene, Deputy Harvey, that any search for the weapon had begun before the Defendant was asked where the knife was located.[9] Thus, the Circuit Court's denial of the Defendant's motion to suppress was unsupported by substantial evidence, based on an erroneous interpretation of law. When looking at the entire record it is clear that a mistake of Constitutional Magnitude was made by the Circuit Judge when he failed to suppress the knife and this case should be reversed accordingly.

D THE CIRCUIT COURT WAS CLEARLY ERRONEOUS IN ITS FINDINGS RELATING TO THE ADMISSIBILITY OF THE DEFENDANT'S WRITTEN STATEMENT AS THERE WAS A CLEAR VIOLATION OF THE PROMPT PRESENTMENT RULE.

1. The circuit Court ruled on two occasions, in two separate suppression hearings that there was "no prompt presentment violation." The facts support the Defendant's position that the primary reason in delay in taking the Defendant to the Magistrate Court was to obtain a confession and the Court's finding were clearly erroneous.

In the Case at hand, the Circuit Court held twice that there was no violation of the Prompt Presentment. Prompt Presentment Requirements are set forth in statutory law at W.Va. Code 62-1-5(a) (1). The first time the Court ruled it went through an extended explanation of why the prompt presentment rule did not apply. Importantly, the Court's factual analysis was inaccurate in the first hearing because the Chief Investigating Officer

[9] Deputy Sutherland, indicated that Deputy Harvey had asked about the location of the knife when he first arrived on the scene. (Page 70 of Transcript of Suppression Hearing of March 27, 2007) However, Deputy Harvey himself was much more vague and the other officers were unclear on from whom they had received the information.

had not revealed the number of officers that was at the scene. The Court goes through a detailed litany of what role the three officers played pointing out specifically that a Man City Police Officer Walls had no jurisdiction to act and that Deputy Harvey was fresh out the academy leaving Deputy Harvey to process the scene. The Court appeared to give little or no weight to the fact that the Officer Sutherland had originally said that he asked him what happened before he went into the house to process the scene and that he was not too *compliant* at that time. Nor did the Court appear to give any weight to the fact that Officer Sutherland said he was *mad* at the time he first came into contact with him. (Suppression Hearing, March 8, 2007 page 109) The Circuit Court state's in part:

> The purpose of any delay from arrival on the scene at 4:44 to placing him under arrest and attempting to take a statement after 6:00 o'clock was not for the sole purpose or primary purpose of just getting a statement form the Defendant.
>
> (404(b) Suppression Hearing, March 8, 2007 at page 139.)

> There was no prompt presentment issue. The Defendant's argument is illogical. To follow it would mean that either one, when as soon as Deputy Sutherland placed the Defendant under arrest he would have to make an election either to leave the crime scene at that point and time and take the Defendant immediately to the courthouse and at 6:30 in the morning there would not have been a magistrate in anyway. They don't come in until 8:30; or, to jail, and give up the opportunity to further process the crime scene.
>
> (404(b) Suppression Hearing, March 8, 2007 at page 139)

The Court's reasoning at the March 8, 2007 Suppression Hearing was clearly centered on the limitations placed on the Chief Investigating Officer.[10] However, the Court did not change its ruling after being made of the reality of how many officers were on the scene and what all occurred prior to written statement. In the Suppression Hearing

[10] The Court explained his interpretation of what the then three officers had to do that would have made taking the Defendant in front of a Magistrate implausible. (see pages 135 –137 of the Transcript of the Suppression Hearing of March 8, 2007.)

of March 27th Deputy Sutherland Acknowledges that Trooper Fry and Trooper Sparks were there. So there are Three Deputies, Two State Police Officers, at least one (probably two) out of jurisdiction Man City Police Officer. Chronologically prior to the written statement the following occurs per the combination of Officer Testimony as it played out through the two suppression hearings: Deputy Harvey takes Paul into custody, Paul makes ***un-Mirandized*** statements/confessions[11], Paul is put in Harvey's cruiser, Sutherland stops and asks one question or more but Paul is mad and non-compliant at that time, Paul is taken out of the cruiser ***un-Mirandized*** to give the location of the knife, Paul is placed back in the Harvey's cruiser, Deputy Sutherland takes Paul out of Harvey's cruiser lets him smoke a Cigarette and then takes the written statement. Despite the new information the Circuit Court concluded that it was insufficient to change its ruling stating in part that there were things that had to be done and that the primary reason he was kept at the scene was not to obtain a statement. (Suppression Hearing of March 27, 2007 at pages 86 and 87)

> The West Virginia Supreme Court of Appeals has ruled:
>
> > The delay in taking a Defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the Defendant. Syllabus Pt. 6 ***State. v. Persinger***, 169 W.Va. 121, 286 S.E.2d 261 (1982), as amended, Syllabus Pt. 1 ***State v. Guthrie***, 173 W.Va.290, 315 S.e.2d 397 (1984)Syl. Pt. 8 State v. Milburn, 204 W.Va. 203, 511 S.E.2d 828 (1998)

It is also important to note that after the March 27, 2007 hearing the Court knew that the facts were not so analogous to ***State v. Wickline*** 184 W.Va. 12, 399 S.E.2d 42 (1990) as the state originally asserted on March 8 because unlike the Defendant in

[11] This is referencing the combination of statements acquired by Officer Bryant and Officer Harvey referenced above.

Wickline, Paul simply wasn't left in the cruiser while scene processing occurred, there was actually more of a continuous questioning process, first Harvey may have questioned him about the location of the knife, then Officer Bryant questioned him, then more ***Un-Mirandized*** questioning relating to where the knife was at and then by Deputy Sutherland. Sutherland acknowledged at their initial contact Paul was mad[12], later when he presumably is not mad Sutherland lets him smoke a cigarette and takes a written statement. The primary purpose of the delay was to get a statement and the statement should have been suppressed accordingly. There were a lot of Officers there, but if you take them at their word Deputy Sutherland did almost everything. Unless a lead investigator exception is carved out to the prompt presentment rule which would allow delay in taking a Defendant before a magistrate until the lead investigator is ready to leave the investigation scene and completely ignoring the other officers available for such transportation, then this was a violation of the prompt presentment requirements and the decision of the Circuit Court should be reversed accordingly.

E: THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN ADMITTING CERTAIN RULE 404(b) EVIDENCE FROM A CASE DISMISSED IN MINGO COUNTY.

1. The Circuit Court ruled that an alleged stabbing from a case dismissed without prejudice in Mingo County was admissible in the case at hand creating a "trial within a trial." This ruling was inconsistent with Rule 403 of the West Virginia Rules of Evidence.

[12] Officer Sutherland was reluctant to verify what he had said in the Preliminary hearing in reference to his first contact with the Defendant in deputy Harvey's car, but when he is read what he said at the preliminary hearing he explained the answer saying "He was mad at that time I guess where they had arrested him. He was upset at that time. I could tell he had a little bit of—he was mad." (See Page 109 of Transcript of Suppression Hearing of March 8, 2007)

The Circuit ruled that evidence relating to an alleged crime of Malicious Assault in Mingo County West Virginia was admissible in the case at hand. The case in Mingo County had been dismissed without prejudice in Magistrate Court. Paul's defense in that case was self-defense and so he was put in the position of having to assert self defense twice, in the case in which he was on trial and in a case from another county. It is the Circuit Court's analyses of Rule 403 that we believe to be most obviously in error insofar as the introduction of the 404(b) evidence. The Circuit Court concluded that the evidence was more probative than prejudicial. The Mingo County incident was an allegation of an unproven Criminal Charge of Malicious Assault so the reality of the Circuit Court's ruling was that it put the Defendant in a position of having to defend two separate criminal cases.

Rule 403 of the West Virginia Rules of Evidence states as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Supreme Court of Appeals for West Virginia has clarified how the importance of Rule 404 evidence and the overriding considerations to be considered as follows:

> We observe that a Rule 404(b) analysis necessarily involves a holistic balancing of relevant considerations, weighing the defendant's right to a fair trial and the State's right to prove its case by introducing relevant evidence. In such balancing, where the potential for unfair prejudice is great, the legitimate purpose of the 404(b) evidence must be particularly well shown. State v. McDaniel, 211 W.Va. 9, 560 S.E. 2d 484 (2001).

In further clarifying 404(b) issues the Supreme Court of Appeals for West Virginia has held:

> In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which relevant and legally connected with the charge for which the accursed is being tried. ***State v. Nelson***, 2007 WVSC 33188 (2007) citing Syl. Pt. 16 ***State v. Thomas***, 157 W.Va. 640, 203 S.E.2d 445 (1974)

In the case at hand the State offered multiple reasons for the 404 evidence at the suppression hearing included in the list from Rule 404 and also including a claim that the Defendant was trying to eliminate the witness against him in the Mingo County Case. (See page 45 of Suppression Hearing Transcript March 27, 2007). Then at trial the State agreed to the limitation on the jury instruction to proof of motive, intent, preparation, and plan. Defense counsel would suggest that if you view the record as whole the two incidents were truly separate and allowing the Mingo incident into evidence caused there to be a trial within a trial in which the Defendant had to argue self-defense twice. So the alleged Malicious Assault for which Paul never got his day in Court was misleading, confusing and created a trial within a trial. In ***State v. McGinnis***, 193 W.Va. 147, 455 S.E.2d 516 (1994) the Supreme Court of Appeals for West Virginia held that trial courts must determine relevancy of other crimes evidence and balance it against prejudice, confusion, and waste of time. Defense counsel believes that the allegations from Mingo County do not meet this standard. Although the allegations have relevancy the prejudicial effect and confusion that the introduction of those allegation caused far out weighs the potential relevancy. The issue at trial should have simply been did Paul act in self-defense on the night in issue, not did he act in self-defense in Mingo County and then

did he act in self defense in Logan County. The decision by the Circuit Court to admit the Mingo case was clearly an abuse of discretion.

REQUEST FOR RELIEF

Wherefore, the Appellant requests that for some or all of the afore-stated reasons that this Court reverse and remand the above referenced matter so that Paul Newcomb might receive a fair trial with the protections of ***Miranda*** intact and with fair and impartial jurors.

Respectfully submitted this the 21st day of August 2008.

Paul Newcomb,
By Counsel.

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IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

STATE OF WEST VIRGINIA,

PLAINTIFF BELOW, RESPONDENT

VS.

UNDERLYING PROCEEDING BELOW

CASE NO. 06-F-210-O

LOGAN COUNTY CIRCUIT COURT

PAUL NEWCOMB,

DEFENDANT BELOW, APPELLANT

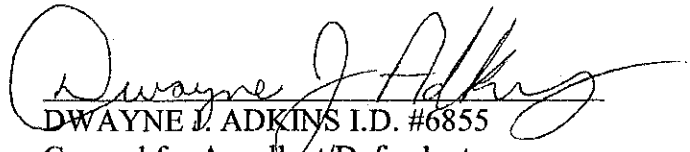
CERTIFICATE OF SERVICE

I, Dwayne J. Adkins, Counsel for Appellant/Defendant, Paul Newcomb, do hereby certify that I have this day served a copy of the attached Appellant's Brief; upon Dawn Warfield and John W. Bennett, by hand delivery a true and exact copy thereof to them at the following address:

Dawn Warfield
Deputy Attorney General
Office of the Attorney General
Capitol Complex
Charleston, WV 25305

John W. Bennett
Assistant Prosecutor
Office of the Prosecuting Attorney
Judicial Annex
Logan, WV 25601

on this the 21st day of August, 2008.



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